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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HOORNBEEK, Defendant and Appellant.	B170576 (Los Angeles County Super. Ct. No. LA041503)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed with directions.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Chung L. Mar and Jeffrey B. Kahan, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Michael Hoornbeek, appeals from his convictions for: one count of assault by means likely to produce bodily injury; one count of battery with serious bodily injury; a finding that he inflicted great bodily injury; and another finding he used a deadly weapon. (Pen. Code,[1] §§ 243, subd. (d), 245, subd. (a), 12022, subd. (b)(1), 12022.7, subd. (a).) He contends that the trial court erroneously admitted evidence he stole from the victim before he brutally beat her and he was denied his right to a jury trial on aggravating factors. We asked the parties to address the issue of errors in the abstract of judgment and proper computation of presentence credits. We affirm the judgment, award defendant an additional day of presentence credit, and direct the correction of the abstract of judgment.

First, defendant contends that the trial court erroneously admitted evidence he committed thefts from the victim, Gloria Docken, before he beat her. The testimony indicated that defendant had stolen from her on many occasions. When he entered her bedroom, she was awaken while he was trying to steal her money. Defendant became enraged and proceeded to assault her. We review this contention for an abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Scheid* (1997) 16 Cal.4th 1, 14.) Putting aside the fact that defendant's entire constitutional contention has been forfeited (Evid. Code, § 353, subd. (a); *People* v. *Padilla* (1995) 11 Cal.4th 891, 971, overruled on other grounds in *People* v. *Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20), no abuse of discretion occurred. Without abusing its discretion, the trial court could conclude that defendant became enraged when he could not do what he had done previously—steal from Ms. Docken. (Evid. Code, § 1101, subd. (b); *People v. Padilla*, *supra*, 11 Cal.4th at p. 925; *People v. Sykes* (1955) 44 Cal.2d 166, 170; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 585-586; *People v. Zack* (1986) 184 Cal.App.3d 409, 413.) Nonetheless, we agree with

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1 All further statutory references are to the Penal Code unless otherwise indicated.

the Attorney General that any error was harmless under any pertinent prejudice based standard. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

Second, defendant argues that he was denied his jury trial right on the aggravating factors relied on by the trial court in selecting the upper term of four years on the aggravated assault count. To begin with, this entire issue has been forfeited. (*United States v. Booker* (2005) 543 U.S. ___, [125 S.Ct. 738, 769]; *United States v. Cotton* (2002) 535 U.S. 625, 631-634.) In any event, there is no possibility of a different result had the matter been submitted to a jury. Upper term treatment was a foreordained reality. The trial court cited six aggravating factors and found no mitigating circumstances were present. In the face of federal constitutional error of the type at issue here, we apply the *Chapman v. California, supra,* 386 U.S. at page 22 harmless error test. (*United States v. Booker, supra,* 543 U.S. at p. ___-___, ___ [125 S.Ct. at pp. 748-749, 769]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079, fn. 9.) Here, there were no mitigating factors.

The trial court relied in part on defendant's extensive record of six misdemeanor convictions. On November 11, 1987, defendant was arrested for and later convicted of prostitution. (§ 647, subd. (a).) While on probation, defendant was convicted of forgery in violation of section 476, subdivision (a). On May 1, 1989, defendant was arrested for and later convicted of burglary. (§ 459.) On January 12, 1995, defendant was arrested for and later convicted of disturbing the peace. (§ 415.) On June 24, 1998, defendant was arrested for and later convicted of prostitution. On March 2, 2001, defendant was arrested for and later convicted of driving with a blood alcohol level of .08 percent or higher and leaving the scene of an accident. (Veh. Code, §§ 23152, subd. (b), 20002, subd. (a).) Defendant was on probation when he was convicted in the present case.

Defendant's prior record as digested above is not subject to the alleged federal constitutional jury right. (*Blakely v. Washington* (2004) 542 U.S. ___, ___ [124 S.Ct. 2531, 2536]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Thomas* (2001)

91 Cal.App.4th 212, 223.) No doubt, the trial court could have imposed the middle term notwithstanding defendant's record of convictions and prison terms. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1771; *People v. Myers* (1983) 148 Cal.App.3d 699, 704.) But in the absence of any mitigating circumstances, the trial court was virtually required to impose the upper term. (See Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation"]; *People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263; *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) Given the uncontroverted record of consistent criminality, any purported federal constitutional error was harmless beyond a reasonable doubt. (*United States v. Booker, supra,* 543 U.S. at p. ___ [125 S.Ct. at p. 769]; *Chapman v. California, supra,* 386 U.S. at p. 22.)

Third, the trial court orally ordered imposition of a section 1202.4, subdivision (b)(1) restitution and a section 1202.45 parole revocation fines in the sum of $500. But the abstract of judgment states that only fines in the sum of $200 were imposed pursuant to sections 1202.4, subdivision (b) and 1202.45. As a general rule, the record will be harmonized when it is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) The Court of Appeal has held, "'[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.'" (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at p. 452; see also § 1207; *In re Daoud* (1976) 16 Cal.3d 879, 882, fn. 1 [trial court could properly correct a clerical error in a minute order nunc pro tunc to conform to the oral order of that date if there was a discrepancy between the two].) The abstract of judgment should be corrected to include the imposition of a section 1202.4, subdivision (b)(1) restitution and a section 1202.45 parole revocation fines in the sum of $500 each. The trial court is to *personally* ensure that the amended abstract of judgment correctly reflects its judgment in all respects. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2.)

Finally, the failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant received an incorrect award of presentence credits. (§§ 2900.5, 2933.1.) He should have received 56 days of conduct credit as well as 374 days actual credit for a total of 430 days.

Upon issuance of the remittitur, the superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 430 days, including 374 actual days and 56 days of conduct credit. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections. The judgment is affirmed in all other respects.

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TURNER, P.J.

I concur:

ARMSTRONG, J.

MOSK, J., Dissenting in part

I disagree with the majority's application of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). I agree with the holding in *People v. Ackerman* (2004) 124 Cal.App.4th 184, 192-195 (*Ackerman*) that there was no forfeiture of the *Blakely* issue and, therefore, do not agree with the majority with regard to the forfeiture analysis. There is no published case to the contrary.[1] The forfeiture rule set forth in *United States v. Cotton* (2002) 535 U.S. 625 does not apply here. (See *Ackerman, supra,* 124 Cal.App.4th at pp. 193-195.) The United States Supreme Court's recent opinion in *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738] (*Booker*) did not appear to alter the forfeiture rule to be applied here.[2]

I agree with the majority that the *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) standard applies with respect to *Blakely, supra,* 124 S.Ct. 2531 errors. (*People v. Emerson* (2004) 124 Cal.App.4th 171, 180.) I disagree with the majority, however, that any error under *Blakely* was harmless beyond a reasonable doubt.

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[1] The Supreme Court has granted a petition for review in *People v. Sample* (2004) 122 Cal.App.4th 206.

[2] Thus far, it would appear that *Booker* does not render *Blakely* inapplicable to California's sentencing provisions. The court in *Booker* said that so long as the federal sentencing guidelines are discretionary facts that the trial court uses in determining the sentence such facts need not be found by a jury. California's sentencing provisions mandate the imposition of the middle term unless there is an aggravating factor. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a) & (b).) Thus, California's sentencing provisions are not totally discretionary. Therefore, in the absence of any authority at this time, I assume *Blakely* should still apply.

(*Chapman, supra,* 386 U.S. at p. 24.) Whether a jury would find the aggravating circumstances is not clear.

The trial court imposed the upper term finding that Docken, the victim, was particularly vulnerable, appellant took advantage of a position of trust, appellant's convictions were of increasing seriousness, and appellant's performance on probation was unsatisfactory. At the sentencing hearing, appellant contested the prosecution's argument that Docken was particularly vulnerable and that he took advantage of a position of trust. In the absence of those aggravating circumstances that were properly referred to the jury, from the record before us I cannot conclude beyond a reasonable doubt that the trial court would have imposed the upper term. Appellant's prior criminal record consisted of six misdemeanors. The trial court listed the factors of vulnerability and trust before the factors related to appellant's criminal record. I concur in the remainder of the judgment.

MOSK, J.